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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW as Special Administrator of the Estate of Erin Rae DeLew; H. ROY MAYBERRY; and VICKIE MAYBERRY,

Petitioners,

v.

JANET KATHLEEN WAGNER, et al.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Must victims having cognizable constitutional claims under 42 U.S.C. § 1983 for a deliberate police cover-up of a wrongful killing be required to establish that "any" and "all" state remedies are ineffective as a prerequisite to pursuing their § 1983 claims?

PARTIES TO THE PROCEEDINGS

Parties before the Court of Appeals were Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry, as appellants; and Janet Kathleen Wagner, Las Vegas Metro Police Department, State of Nevada, Nevada Highway Patrol, Lieutenant Edward Jensen, Sergeant Richard Womack, Sergeant Curtis Albert, Sergeant Thomas Harmon, Detective Richard Hart, Detective William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner, Officer Greg Goen, Sergeant William Adamson, Sergeant Harvey Weatherford, Trooper Joseph A. Smith, Trooper Garth Gardner, Trooper Joseph Wyngard, and Trooper James Brannum, as appellees.

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PETITION FOR WRIT OF CERTIORARI

Michael C. DeLew, individually, Michael C. DeLew as Special Administrator of the Estate of Erin Rae DeLew, H. Roy Mayberry, and Vickie Mayberry (the "DeLews") respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported and appears in the Appendix at App. 1a to 9a. The opinion of the United States District Court for the District of Nevada is not officially reported. It appears in the Appendix at App. 10a to 12a.

JURISDICTION

The opinion of the Court of Appeals was entered on May 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the First Amendment, the Fifth Amendment, Section 1 of the Fourteenth Amendment, and Section 2 of Article IV, the United States Constitution; 42 U.S.C. § 1983; and § 484.379 of the Revised Code of the State of Nevada. These are reprinted at App. 13a to 14a.

STATEMENT OF THE CASE

The right to meaningful access to courts is a fundamental right protected by the Constitution, and is one of the "highest and most essential privileges of citizenship." *Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). Mere technical access is insufficient to satisfy this constitutional right, which guarantees access that is "adequate, effective and meaningful." *Bounds v. Smith*, 430 U.S. 817, 820 (1977). When officials act under color of state law to conceal facts that would form the basis for a cause of action, victims of the cover-up possess cognizable claims under 42 U.S.C. § 1983 for denial of this fundamental right and substantive due process. *See Bell v. City of Milwaukee*, 746 F.2d 1205, 1261 (7th Cir. 1984); *Ryland v. Shapiro*, 708 F.2d 967, 975 (5th Cir. 1983).[1]

Police cover-ups prejudice a victim's chances of recovery in state court, cause independent injury separate and apart from the underlying state wrongful act, and themselves constitute constitutional deprivations by interfering with constitutionally protected rights, including the right to meaningful access to courts and substantive due process. *Ryland*, 708 F.2d at 971-74.

The Ninth Circuit below recognized that the DeLews had stated "cognizable" claims under 42 U.S.C. § 1983, but the court nevertheless ordered dismissal of the action without

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[1] The right of meaningful access to the courts finds support in several provisions of the Constitution, including the Due Process Clause of the Fourteenth Amendment, *Wolff v. McDonnell*, 418 U.S. 539, 579 (1974); the Equal Protection Clause, *Pennsylvania v. Finley*, 481 U.S. 551, 557 (1987); the First Amendment, *Turner v. Safley*, 482 U.S. 78, 84 (1987) (citing *Johnson v. Avery*, 393 U.S. 483 (1969)); and the Privileges and Immunities Clause of Article IV. *See, e.g., Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148(1907); *Smith v. Maschner*, 899 F.2d 940, 947 (10th Cir. 1990).

prejudice to re-file "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." Ninth Circuit Opinion at 9a. This judicially mandated Ninth Circuit practice has no legal basis, statutory or otherwise, and conflicts with Congressional intent, this Court's precedent, and other circuit court authorities. In essence, the Ninth Circuit has cast an additional burden upon § 1983 cover-up victims by requiring them to establish, as a condition precedent to maintaining a § 1983 action, that "all" state remedies on the underlying claims be shown to be "ineffective."

The Ninth Circuit's additional impediment is directly contrary to this Court's long recognized pronouncements that the "principal remedy Congress chose to provide injured persons [under § 1983] was *immediate* access to federal courts," *Felder v. Casey*, 487 U.S. 131, 147 (1988) (emphasis added) (citing *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 503-04 (1982)), and that cognizable claims "should immediately go forward." *Edwards v. Balisok*, __ U.S. __, 117 S. Ct. 1584, 1589 (1997). Moreover, this Court has stated that any burdening of the remedial purposes of § 1983 such as requiring "civil rights victims to seek compensation from offending state officials before they could assert a federal action in State court" is "utterly inconsistent" with § 1983. *Felder*, 487 U.S. at 149. This petition should be granted to bring the Ninth Circuit in line with the statutory mandate of § 1983, Congressional intent and this Court's and other Circuit court pronouncements.

A. Background

In Las Vegas, the police and their family members "do things the way [they] please," secure in the knowledge that the laws which apply to everyone else do not apply to them. *See McKenzie v. Lamb*, 738 F.2d 1005, 1011 (9th Cir. 1984).[2] To this end, in the early evening hours of September 27, 1994, Janet Wagner thought nothing of drinking three beers through a straw on an empty stomach, while driving in her red GMC Jimmy truck, and proceeding to speed down a residential road, swerving in and out of her lane of traffic, indifferent to the laws and to others who happened into harm's way.

No one except Janet Wagner will ever know to what direction her attention was turned that evening, but it was not on the road where she was driving. As she sped along, feeling the effects from her beers, she did not notice Erin Rae DeLew on her bicycle, clearly visible on the well-lit, residential road. Erin had no chance to see Mrs. Wagner, who struck Erin with her truck from behind, hurling Erin 60 feet through the air and onto the pavement. The force of the impact caused Erin to suffer profuse bleeding, multiple abrasions, fractures and a massive head wound. Erin was pronounced dead two hours later, at 9:30 p.m., as a result of these injuries.

No matter. Mrs. Wagner simply would call her husband, David Wagner, a police officer with the Las Vegas Metropolitan Police Department ("METRO"), and he would take care of everything. Mrs. Wagner called her husband — not an ambulance — from her car phone while Erin lay bleeding on the pavement, barely breathing. Officer Wagner

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[2] Because the DeLews' complaint was dismissed on a motion to dismiss, the factual allegations of the complaint and all reasonable inferences are to be construed in the light most favorable to the DeLews. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

arrived within minutes. As soon as his fellow officers arrived on the scene, he began orchestrating the cover-up, directing them to do whatever might be best for Mrs. Wagner. First, they moved her away from the scrutinizing public that had gathered on the sidewalk to the protection of a fellow police officer's car. Although she was conveniently sitting in the patrol car, Mrs. Wagner was not asked any questions about what had happened. No one asked her if she had been drinking. Nor was a field sobriety test performed.

By this time the beers were taking their toll on Mrs. Wagner — she needed to use the restroom. So, in the midst of the fatal traffic investigation, two of Officer Wagner's fellow METRO officers drove Mrs. Wagner in their police car to her home so that she could use the restroom and freshen up.

After delaying for nearly two hours, Officer Wagner and his fellow METRO officers decided enough time had passed that they could call in the Nevada Highway Patrol ("NHP") to "investigate" the fatal collision, recognizing that since Mrs. Wagner was the wife of one of their fellow officers, someone might question their objectivity.

They also may have figured enough time had passed that *surely* Mrs. Wagner would have sobered up by the time the NHP arrived. Nevertheless, when a young NHP officer mentioned he smelled alcohol on Mrs. Wagner's breath, Lieutenant Jensen of METRO, the senior officer at the scene, stepped forward and said it was *he* who had been drinking and smelled of alcohol, *not* Mrs. Wagner.

Although calling the NHP bought more time, a blood alcohol test would eventually need to be taken given the observation of the young NHP officer. They needed a different way to disguise Mrs. Wagner's level of intoxication. Accordingly, when Mrs. Wagner's blood draw was finally taken (three hours and fifteen minutes after the collision), they

made sure only *one* blood draw was taken, not two blood draws separated by time as is the normal procedure.

When the results of the blood draw eventually came back, Mrs. Wagner still had a blood alcohol level of .05 — more than three hours after the collision. Yet, having taken only one blood draw and having delayed for more than two hours in conducting the blood draw, the rate of dissipation was forever lost, and the evidence would not be admissible in a criminal trial under Nevada law. Nev. Rev. Stat. § 484.379 (1997). When the DeLews attempted to test independently the remaining blood drawn from Mrs. Wagner, there was an insufficient quantity remaining for any analysis.

Having subverted the most damaging piece of evidence, they proceeded to corrupt the remaining evidence which might implicate Mrs. Wagner. They fabricated the witness statements they chose to take, and failed altogether to take statements from other percipient witnesses. In direct violation of established fatal traffic investigation procedures, they failed to preserve adequately the physical evidence at the scene of the accident — including the skid marks which would have established that it was Mrs. Wagner who recklessly swerved into Erin's right-of-way.

Once the physical evidence had been sufficiently corrupted, they needed to throw Erin's family off track. To this end, they lied to the DeLews and told them it was Erin's fault that she died — that it was Erin who had swerved in front of Mrs. Wagner's car. They falsified the traffic collision report to make it reflect this same falsehood. They lied to and concealed from the Coroner's Office investigator that Mrs. Wagner was driving drunk when she killed Erin. They issued a false police report claiming Erin was responsible for her own death, despite the fact that Mrs. Wagner, the wife of their fellow officer, had been driving drunk, speeding and swerving recklessly. And the cover-up was successful: Janet

Wagner was never arrested — or even cited — for manslaughter for having killed Erin Rae DeLew while driving intoxicated.

B. Procedural Background

In November of 1994, the DeLews filed a wrongful death suit against Janet Wagner in a Nevada court. After evidence of the police cover-up emerged during discovery, the DeLews filed their 42 U.S.C. § 1983 claims in state court. Defendants removed the action to federal court, where on April 3, 1997, the district court judge granted Janet Wagner's motion to dismiss and *sua sponte* dismissed all claims as to all defendants.[3] District Court Order at 12a.

The DeLews appealed. On May 11, 1998, the Ninth Circuit reversed. The Ninth Circuit held that the DeLews had "cognizable" claims under § 1983, but dismissed the action without prejudice stating that the DeLews could re-file their § 1983 action "if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective." Ninth Circuit Opinion at 9a. According to the Ninth Circuit's analysis, such a determination was required and impossible to make until the state wrongful death claim was adjudicated to final judgment. The Ninth Circuit implicitly found that, as a condition of seeking relief under § 1983, victims of police cover-ups must first pursue to final judgment any and all state

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[3] The district court's jurisdiction was based upon 28 U.S.C. § 1331 and § 1343 (1994).

law remedies on the underlying claim and then establish that these remedies were "ineffective" before bringing their § 1983 action.

REASONS FOR GRANTING THE WRIT

A. The Ninth Circuit's Requirement That All State Court Remedies Actually Be Rendered Ineffective As A Prerequisite To Maintaining A Cognizable § 1983 Action Has No Legal Support, Is Contrary To § 1983, Congressional Intent And This Court's Precedent, And Conflicts With Other Circuit Court Authorities.

1. The Ninth Circuit's Decision Is Contrary To The Language Of § 1983, Congressional Intent, And This Court's Precedent.

When police officers deliberately and irretrievably destroy crucial evidence, the victims' constitutional rights to meaningful access to courts and due process are infringed. *Bell*, 746 F.2d at 1261-62 (due process clause imposes a duty that state actors "involved in the investigation of a wrong perpetrated by a co-employee under color of state law not conceal the perpetration of that wrong"); *Ryland*, 708 F.2d at 972-73 (determining that plaintiffs had "a substantive constitutional right of access to the courts as well as a property right in the wrongful death action").[4]

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[4] An official police cover-up of the wrongful killing of a citizen's child is the type of egregious governmental conduct that shocks the conscience and is actionable as a violation of substantive due process. *Ryland v. Shapiro*, 708 F.2d 967, 972-73 (5th Cir. 1983); *Webster v. City of Houston*, 689 F.2d 1220, 1239 (5th Cir. 1982) ("It is an unspeakable perversion, however, when the faceless minions of the state, the very ones charged with preventing and investigating murders, have a covert policy of concealing such a crime committed by one of their own") (Goldberg, J.,

Although the Ninth Circuit recognized that the DeLews had stated "cognizable" claims under § 1983 for infringement of their constitutional rights, the court nonetheless dismissed the claim until and unless the DeLews show that "any" and "all" state remedies have been rendered ineffective by the cover-up. The Ninth Circuit's decision to dismiss without prejudice cognizable claims under 42 U.S.C. § 1983 for the cover-up and conspiracy to cover-up the facts surrounding Erin DeLew's death has no legal support, [5] is contrary to the plain mandate of 42 U.S.C. § 1983 and Congressional intent, and conflicts with this Court's and other circuit court authorities.

42 U.S.C. § 1983 itself has no such condition precedent to pursuit of a cognizable claim. Indeed, the statute allows suit for "any" deprivation of a constitutional right without qualification. This Court has recognized on numerous occasions that § 1983 "must be broadly construed" and that it provides a remedy "'against all forms of official violation of federally protected rights.'" *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 105-06 (1989) (quoting *Monell v. Department of Social Servs.*, 436 U.S. 658, 700-01 (1978)). Equally important, this Court has long emphasized that the "principal remedy Congress chose to provide injured persons [under § 1983] was *immediate* access to federal courts." *Felder*, 487 U.S. at 147 (emphasis added).

(cont'd.)..
concurring); *see also White v. Rochford*, 592 F.2d 381, 383-85 (7th Cir. 1979).

[5] The Ninth Circuit's decision below rested solely on dicta from a Sixth Circuit case, *Swekel v. City of River Rouge*, 119 F.3d 1259, 1264 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998), which affirmed dismissal because plaintiff had failed to present *any* evidence of the alleged cover-up on a motion for summary judgment, as required under Rule 56, Federal Rules of Civil Procedure.

Like other federal courts, the courts within the Ninth Circuit have an "unflagging obligation" to exercise jurisdiction Congress conferred upon them — especially in cases brought under § 1983. *See, e.g., Deakins v. Monaghan*, 484 U.S. 193, 203-04 (1988); *Martinez v. City of Newport Beach*, 125 F.3d 777, 781-82 (9th Cir. 1997).

Nor is there any Supreme Court authority requiring a party having cognizable § 1983 claims for a police cover-up of criminal acts to first establish that "all state court remedies be rendered ineffective" on the underlying claim as a prerequisite to prosecuting admittedly cognizable § 1983 claims. As this Court has emphasized time and again,

> [i]t is no answer that the State has a law which if enforced would give relief. The federal remedy is supplementary to the state remedy, and the latter need not first be sought and refused before the federal one is invoked.

Monroe v. Pape, 365 U.S. 167, 183 (1961), *overruled in part, Monell v. Department of Social Servs.*, 436 U.S. 658 (1978).

This Court recently reaffirmed its commitment to the immediacy principle underlying § 1983 jurisprudence, emphasizing that "a claim either is cognizable under § 1983 and should immediately go forward, or is not cognizable and should be dismissed." *Edwards*, __ U.S. at __, 117 S. Ct. at 1589. Here, the Ninth Circuit specifically recognized the cognizability of the DeLews' claim, but nonetheless ordered dismissal, completely undermining § 1983, Congressional intent and this Court's precedent.

2. The Ninth Circuit's Practice Conflicts With Other Circuit Court Authorities.

The Ninth Circuit's extraordinary practice of requiring victims of police cover-ups and conspiracies to first adjudicate to final judgment the underlying claim and establish that the police cover-up "actually rendered all state court remedies ineffective" is in conflict with at least three other circuit courts. *See Barrett v. United States*, 689 F.2d 324, 331-32 (2d Cir. 1982), *cert. denied*, 462 U.S. 1131 (1983); *Ryland*, 708 F.2d at 974-75; *Webster v. City of Houston*, 689 F.2d 1220 (5th Cir. 1982); *Grandstaff v. City of Borger*, 767 F.2d 161 (5th Cir. 1985); *Bell*, 746 F.2d at 1261; *Hampton v. Hanrahan*, 600 F.2d 600 (7th Cir. 1979); *Stone v. City of Chicago*, 738 F.2d 896 (7th Cir. 1984); *Gibson v. City of Chicago*, 910 F.2d 1510 (7th Cir. 1990); *Nielsen v. Clayton*, 1995 U.S. App. LEXIS 17126, at *1 (7th Cir. July 11, 1995).

In *Bell*, police officers conspired to cover up the true facts of a fellow officer's killing of an innocent man. 746 F.2d at 1215-22. The truth about the killing remained obscured until one of the officers stepped forward. *Id.* at 1223. The Seventh Circuit held constitutional rights are infringed where "police officials shield from the public and the victim's family key facts which would form the basis of the family's claim for redress." *Id.* at 1261. Resolution of the underlying state wrongful death claim, settled earlier through the payment of monies to the Bell family, did not moot the § 1983 claim; the constitutional violation stood on its own. Nor must the cover-up be completely and unambiguously successful — "substantial concealment" is sufficient. *Id.* at 1263, n.72 (holding that § 1983 claim existed for police cover-up despite ambiguities surfacing in news articles and earlier inquest).

Likewise, the Fifth Circuit allows § 1983 cover-up claims to proceed independently of any underlying cause of action without any requirement that the victim first establish that all remedies on the underlying claim be rendered ineffective. *See*

City of Borger, 767 F.2d at 172-73 (implicitly holding no requirement for pursuit of any underlying cause of action as prerequisite for § 1983 claim); *Ryland*, 708 F.2d at 974 (same); *Webster*, 689 F.2d at 1223 (same).

In *Ryland*, the defendants conspired to hide the truth about a wrongful death, and the cover-up resulted in an eleven month delay before the truth emerged. The Fifth Circuit held that the state actors' unlawful conduct

> could have prejudiced the [plaintiffs'] chances of recovery in state court because the resulting delay would cause stale evidence and the fading of material facts in the minds of potential witnesses . . . and could well prove more expensive to litigate such action.

708 F.2d at 975-76. The Fifth Circuit does not require that victims first establish in state court that the cover-up "actually rendered all state court remedies ineffective," as a prerequisite to pursuit of their § 1983 cover-up and conspiracy claims.

In *Barrett*, the United States Army caused the wrongful death of an unknowing participant in a chemical warfare experiment, and then concealed the truth. 689 F.2d at 326. The Second Circuit allowed the § 1983 claim to proceed despite the prior recovery on the underlying claim. *Id.* at 332.

In contrast to the Second, Fifth, and Seventh Circuits, the Ninth Circuit holds that victims of police cover-ups must first establish that the cover-up actually rendered "any" and "all" state court remedies ineffective before seeking relief for the separate and independent constitutional violations. *See Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 625 (9th Cir. 1988); *Dooley v. Reiss*, 736 F.2d 1392, 1394-95 (9th Cir.), *cert. denied*, 469 U.S. 1038 (1984). The rationale is that a plaintiff who recovers anything on the underlying claim — no

matter how nominal or difficult to obtain — has suffered no constitutional deprivation due to the deliberate police cover-up. The recovery essentially moots the otherwise cognizable § 1983 violation.

Thus, a victim of a police cover-up can expect one result if the claim is brought in the Ninth Circuit, and a vastly different one if he or she is fortunate enough to be in the Second, Fifth, or Seventh Circuit. Because of the need for uniformity among the courts of appeal, and the elemental importance of deterring state actors from covering up illegal conduct, the Court should grant this petition and resolve this circuit split in favor of allowing victims of unconstitutional conduct to vindicate their rights without a concomitant requirement that they first establish that "any" and "all" state law remedies have proven ineffective.

B. Because The DeLews Suffered Distinct, Cognizable Injuries From The Deliberate Police Cover-Up, Resolution Of The Underlying Claims Necessarily Cannot Afford Adequate And Effective Redress For The Constitutional Violations.

No form of victory in a state court wrongful death action can vindicate the deprivation of the DeLews' constitutional rights or otherwise moot their § 1983 claims. Undeniably, the deliberate destruction of crucial evidence has made it much more difficult and expensive for the DeLews to prove their wrongful death claim and obtain full and complete redress. This increased difficulty and burden alone necessarily has diminished the value of the property right in the underlying claim.

The police conspiracy to protect Officer Wagner's wife cost the DeLews inculpatory and essentially irrefutable evidence of her blood alcohol level at the time of the collision, statements of percipient witnesses, and physical evidence from

the crime scene. The destruction of the alcohol-related evidence by itself all but forecloses the recovery of punitive damages or a finding of 100% fault to Officer Wagner's wife under Nevada's comparative negligence statute. Without this vital evidence, even if the DeLews prevail to some degree on their state wrongful death action, the value of that claim has been reduced. That reduction in value is capable of being quantified today — in much the same way that the state court will quantify the remaining value of the diminished wrongful death claim. Plaintiffs can quantify these injuries today, and should be allowed to do so immediately in their § 1983 claim in federal court.[6]

In *Barrett*, the Second Circuit held that, in addition to the due process property right in a cause of action, plaintiffs also had a right to the recover the diminished value of their claim: the difference between the settlement they agreed to during the cover-up and the compensation they would have received in the absence of the conspiracy. 689 F.2d at 331-32. Regardless of the compensation paid plaintiffs in settlement, they possessed a legitimate claim that the government's

> obstruction of justice in conducting a defense to that action deprived them, not of the whole of their constitutionally protected property consisting of the lawsuit, but only of *a part of that protected property amounting to an increment in its value*.

Id. at 332 (emphasis added).

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[6] Nor is there any requirement that the DeLews show with precision the diminution in value of the underlying claim caused by the official cover-up. *Bell*, 746 F.2d at 1263, n.72. The Seventh Circuit rejected such a rule because it is the substantial official concealment of facts by the involved police officer that "precludes knowledge of the relief plaintiffs otherwise would have obtained." *Id.*

In addition to the decreased value of the property interest in the state cause of action, only the § 1983 claim can compensate the DeLews for the emotional distress resulting from the deliberate cover-up. A constitutional deprivation, such as a conspiracy to deprive citizens of meaningful access to the courts, entitles the victims to damages for emotional distress. *See Carey v. Piphus*, 435 U.S. 247, 264 (1978); *Nielsen*, 1995 U.S. App. LEXIS 17126, at *18; *Bell*, 746 F.2d at 1265-66; *Ryland*, 708 F.2d at 976. This injury is separate and distinct from that caused by Erin's death, and the DeLews should be allowed to proceed immediately to prove and receive compensation for this loss.

Similarly, no amount recovered on the underlying property claim can ever compensate the DeLews for the infringement of their liberty interests caused by the infringement of their rights to meaningful access to court. *See Williams v. Lane*, 851 F.2d 867, 881 (7th Cir. 1988) (holding deprivation of prison inmates' access to courts amounted to denial of liberty interest); *Bell*, 746 F.2d at 1242-47; *Ryland*, 708 F.2d at 971. This separate basis of constitutional infringement cannot be redressed by any available remedy in the state wrongful death action.

Finally, even if the Delews were to recover substantial damages in the state wrongful death action, that would not affect the cognizability of the § 1983 claims. Nominal damages are recoverable for § 1983 violations. *See, e.g., Carey*, 435 U.S. at 266 (deprivation of certain absolute rights actionable for nominal damages in order to recognize "the importance to organized society that those rights be scrupulously observed; . . ."); *Ryland*, 708 F.2d at 976. The potential or actual damages on the two actions are separate and distinct, and the Ninth Circuit should not be allowed to speculate to the contrary as a basis for dismissing and delaying prosecution of the cognizable § 1983 claims.

C. The Ninth Circuit's Decision Encourages Lawless Conduct, Forces Police Cover-Up Victims Into A Costly Litigation Conundrum, Discourages Settlement Or Resolution, And Creates Impossible Problems Of Measuring The Adequacy Of The Remedy Obtained On The Underlying Claim.

The Ninth Circuit's rule creates a costly and legally unsupportable conundrum for police cover-up victims like the DeLews. To earn the opportunity to redress violations of their constitutional rights resulting from police cover-ups or conspiracies, police cover-up victims must establish that "any" and "all" state law remedies for the underlying claims have been rendered "ineffective." In other words, in the Ninth Circuit, police cover-up victims must not only try to final judgment the underlying action, they must then show that any and all remedies obtained were ineffective. Such a requirement amounts to an impermissible burden on § 1983 victims, *Felder*, 487 U.S. at 141, 144-45 ("notice requirement burdens the exercise of the federal right . . ." and impermissibly "conditions the right to bring suit against the very persons and entities Congress intended to subject to liability.") Such a burden was never intended by Congress and is completely contrary to the broad remedial purposes of § 1983. *See Carey*, 435 U.S. at 253-58.

The adverse consequences of such a rule of law cannot be overstated. First, and perhaps most significantly, the Ninth Circuit's rule creates nearly impossible problems in measuring the effectiveness of the underlying remedy. What quantum of success in the underlying lawsuit will be deemed an effective remedy? Who will decide when the remedy is adequate enough? Even if a police cover-up victim prevails in the underlying action, this modicum of success cannot possibly be an accurate reflection of the outcome had no cover-up taken place and no evidence been destroyed. *See Bell* 746 F.2d at 1265, n.72 (holding that there is no requirement that plaintiffs show "exactly what relief plaintiffs would have obtained [on

the underlying claim] had defendants not concealed the truth." . . . "since defendants' concealment of the facts . . . precludes us from knowing what would have happened otherwise . . ."). Allowing the § 1983 claim to proceed contemporaneously with the state action avoids the difficulty of determining and measuring the necessary quantum of success or failure on the underlying claim, and guarantees that the victim's constitutional rights will be vindicated and redressed.

Second, it does nothing to deter or discourage the very conduct Congress sought to curb when it enacted § 1983 — lawless conduct by state actors — particularly law enforcement officers. *See Wyatt v. Cole*, 504 U.S. 158, 161 (1992) (citing *Carey*, 435 U.S. at 254-57) (§ 1983's purpose is to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails."). Indeed, such a rule encourages police officers in the Ninth Circuit to engage in cover-ups, knowing that victims will be required first to adjudicate to final judgment the underlying claim before having the right to pursue the cover-up or conspiracy claims.

Third, the decision below discourages settlement and resolution of the underlying claim because such settlement may be deemed to be an effective remedy which, according to the Ninth Circuit, would moot the § 1983 claims.

Finally, the Ninth Circuit's rule, which delays indefinitely trial of the § 1983 claims, wholly undermines the "immediacy" principle intended by Congress and emphasized by this Court, subverting the historic intent of § 1983 to provide victims of constitutional deprivations with "immediate access to the federal courts notwithstanding any provision of state law to the contrary." *Patsy v. Board of Regents of Fla.*, 457 U.S. 496, 504 (1982). It also compounds the delay and compromises our justice system. As noted by the Fifth Circuit in *Ryland*,

> Delay haunts the administration of justice. . . . The most erratic gear in the justice machinery is at the place of fact finding, and possibilities for error multiply rapidly as time elapses between the original fact and its judicial determination.

708 F.2d at 974 (quoting *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980)). It is truly ironic that the Ninth Circuit compounds the initial delay caused by the cover-up, a practice that works to ensure that the truth will remain unknown for at least the duration of the underlying judicial proceeding. With every passing day, the DeLews' chances of vindicating their constitutional rights necessarily diminish.

The Ninth Circuit's practice poses an impossible quandary for § 1983 cover-up victims: to win the opportunity to vindicate their federal rights they must first try to judgment their underlying claim and then convince a second court that whatever remedy is obtained was "ineffective." Under the Ninth Circuit's approach, distinct injuries resulting from the cover-up are never compensated, nor are police given any incentive *not* to conceal their illegal conduct. If the deliberate cover-up fails, the victims must still overcome two hurdles before obtaining the right to vindicate their constitutional rights. If the deceit is successful, it is unlikely that the victims will ever uncover sufficient facts to prevail in either the underlying claim or the § 1983 cover-up claim. Requiring § 1983 cover-up victims to first exhaust "any" and "all" remedies on the underlying claim as a condition precedent to pursuing admittedly cognizable claims amounts to judicial legislation and cannot withstand scrutiny.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL C. DELEW; MICHAEL C. DELEW
as Special Administrator of the Estate of Erin Rae DeLew;
H. ROY MAYBERRY; and VICKIE MAYBERRY,
Petitioners,

v.

JANET KATHLEEN WAGNER, et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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August 10, 1998

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL C. DELEW; MICHAEL C. DELEW, as Special Administrator of the Estate of Erin Rae Delew; ERIN RAE DELEW, Estate of; H. ROY MAYBERRY; VICKIE MAYBERRY,
Plaintiffs-Appellants,
v.
JANET KATHLEEN WAGNER; LAS VEGAS METRO POLICE DEPARTMENT; STATE OF NEVADA; NEVADA HIGHWAY PATROL; EDWARD JENSEN, Lieutenant; RICHARD WOMACK, Sergeant; CURTIS ALBERT, Sergeant; THOMAS HARMON, Sergeant; RICHARD HART, Detective; WILLIAM JOHNSON, Detective; WILLIAM SMITH, Officer; KEITH BOWERS, Officer; DAVID WAGNER, Officer; GREG GOEN, Officer; WILLIAM ADAMSON, Sergeant; HARVEY WEATHERFORD, Sergeant; JOSEPH A. SMITH, Trooper; GARTH GARDNER, Trooper; JOSEPH WYNGARD, Trooper; JAMES BRANNUM, Trooper,
Defendants-Appellees.

No. 97-15778
D.C. No.
CV-97-00090-PMP
OPINION

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted
March 12, 1998—San Francisco, California

Filed May 11, 1998

Before: Joseph T. Sneed, Harlington Wood, Jr.,* and Diarmuid F. O'Scannlain, Circuit Judges.

Opinion by Judge Sneed

SUMMARY

Individual Rights/Civil Rights

The court of appeals reversed a judgment of the district court. The court held that under 42 U.S.C. § 1983, a police cover-up of the facts underlying a tort claim is sufficient to support a federal constitutional claim based on the denial of meaningful access to state courts.

Erin Delew died when her bicycle was struck by a vehicle driven by appellee Janet Wagner. An investigation by officers of appellees Las Vegas Metropolitan Police Department (LVMPD) and the Nevada Highway Patrol (NHP) cleared Wagner.

Appellants Michael Delew and Vickie Mayberry (Delews) sued Wagner for wrongful death in state court. When evidence of a police cover-up came to light, they sought leave to amend their complaint to add a claim under § 1983. The trial court denied their motion and directed the Delews to file a separate § 1983 complaint.

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* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

The Delews filed a separate § 1983 action in state court against Wagner, LVMPD, NHP, and various individual officers and police officials. The complaint alleged that Wagner, whose husband was a LVMPD officer, and certain named officers covered up and conspired to cover up the true facts surrounding Erin's death; Wagner had operated her vehicle negligently and while under the influence of alcohol; the officers deliberately failed to perform field sobriety and blood-alcohol tests on Wagner; the officers deliberately failed to preserve physical evidence; and the officers allowed Wagner to leave the scene of the accident.

The defendants removed the action to federal court. Wagner moved to dismiss for failure to state a claim.

Although the other defendants had not joined in Wagner's motion, the district court dismissed the action as to all defendants on the ground that the allegations of the complaint failed to provide an independent basis for relief under § 1983. The court dismissed the conspiracy claim on the ground that there was no evidence or allegation that the alleged conspirators violated any cognizable protected right. Alternatively, the court dismissed the complaint on the ground that the Delews had impermissibly split their causes of action by bringing the state wrongful death action and a separate action under § 1983. The Delews appealed.

[1] The Delews alleged a constitutional violation, namely that the defendants violated their right of meaningful access to the courts by covering up the true facts surrounding Erin's death. The right of access to the courts is a fundamental right protected by the Constitution. Denial of meaningful access to the courts is established when a party engages in pre-filing actions that effectively cover up evidence and render any state-court remedy ineffective.

[2] The complaint alleged a cognizable claim under § 1983. To prevail on their claim, the Delews had to

demonstrate that the defendants' cover-up violated their right of access to the courts by rendering any state-court remedy ineffective. However, because the wrongful death action remained pending in state court, it was impossible to determine whether this in fact occurred.

[3] The district court additionally erred by holding that the conspiracy cover-up claim failed to state a claim for relief. Construing the facts in a light most favorable to the Delews, it was reasonable to infer an understanding between Wagner and the officers to cover up the true facts of Erin's death, and thereby deprive the Delews of their right of access to the courts.

[4] The district court should have recognized the cognizability of the Delews' claims and dismissed their complaint without prejudice. The Delews would have had the opportunity to refile their § 1983 action if the alleged cover-up actually rendered all state-court remedies ineffective. [5] The court further erred in ruling that the Delews split their causes of action. The state court effectively split the causes of action by denying the Delews' motion to join the two actions in one proceeding. The rule concerning claim-splitting was not applicable.

COUNSEL

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Keith Edwards, Edwards, Hale & Sturman, Bridgette Branigan, Deputy Attorney General, Peter M. Angulo, Rawlings, Olson, Cannon Gormley & Desruisseaux, Las Vegas, Nevada, for the defendants-appellees.

OPINION

SNEED, Circuit Judge:

Plaintiffs Michael C. Delew and H. Roy and Vickie Mayberry ("the Delews")[7] appeal the district court's dismissal of their suit under 42 U.S.C. § 1983. We must decide whether the Delews' complaint states a claim for relief under section 1983. We conclude that it does. We therefore remand with instructions consistent with this opinion.

I.

BACKGROUND

Erin Rae Delew died when her bicycle was struck by a vehicle driven by Janet Kathleen Wagner. An investigation undertaken by the Las Vegas Metropolitan Police Department ("LVMPD") and Nevada Highway Patrol ("NHP") ultimately found that Janet Kathleen Wagner was not the cause of Erin Rae Delew's death. The Delews are not convinced. They allege that Wagner, whose husband is an LVMPD officer, and certain named LVMPD and NHP officers, covered-up and conspired to cover-up the true facts surrounding Erin Rae Delew's death in violation of the Delews' constitutional rights.

In their complaint, the Delews allege that Janet Kathleen Wagner operated her vehicle negligently by driving (1) 30% in excess of the maximum posted speed limit, (2) while under the influence of alcohol, and (3) in violation of the deceased's right-of-way. They further allege that the LVMPD and NHP officers allowed Wagner to leave the scene of the accident during the initial investigation.

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[7] Michael C. Delew is the deceased's husband. H. Roy and Vickie Mayberry are the deceased's parents.

The Delews further allege that after the LVMPD and NHP officers learned the true facts of Erin Rae Delew's death, they successfully covered-up the true facts by: (1) deliberately refraining from performing a field sobriety test on Wagner; (2) deliberately refraining from performing a chemical blood alcohol test on Wagner within two hours of the fatal accident; (3) deliberately failing to preserve physical evidence such as skid marks and relevant debris; and (4) allowing Wagner to leave the scene of the accident. The defendants flatly deny the allegations.

On November 10, 1994, the Delews filed a wrongful death action against Janet Kathleen Wagner in state court. We are informed that trial is set for February, 1999. After evidence of a cover-up surfaced during the discovery phase, the Delews sought leave to amend their wrongful death action by adding a section 1983 claim. The state court denied the motion and directed the Delews to file a separate section 1983 complaint. While we question the soundness of that decision, we have no power to correct it and must accept the unique posture the Delews' claims appear before us.

On September 26, 1996, the Delews filed their section 1983 action in state court. The defendants removed the case to the district court pursuant to 28 U.S.C. § 1441(a), (b). Immediately thereafter, Janet Kathleen Wagner independently moved to dismiss under Fed. R. Civ. P. 12(b)(6). Despite the failure of the remaining defendants to join the motion, the district court dismissed as to all defendants on the ground that the Delews' allegations failed to provide an independent basis for relief under section 1983. The district court dismissed the Delews' conspiracy claim on the ground that there was no evidence or allegation of evidence that the alleged conspirators infringed upon any cognizable protected right. In the alternative, the court dismissed the entire complaint on the ground that the Delews had impermissibly split their causes of actin by bringing a state wrongful death action and a separate action under section 1983. The Delews appeal these rulings.

II.

JURISDICTION AND STANDARD OF REVIEW

This action fell within the district court's original jurisdiction. *See* 28 U.S.C. §§ 1331, 1343. The judgment of the district court granting dismissal is an appealable final order. *See* 28 U.S.C. § 1291.

We review the district court's order of dismissal under Rule 12(b)(6) de novo. *See Stone v. Travelers Corp.*, 58 F.3d. 434, 436-37 (9th Cir. 1995). We will affirm the district court's order of dismissal only if it appears "beyond doubt" that the Delews can prove no set of facts that would entitle them to relief. *See Mountain High Knitting, Inc. v. Reno*, 51 F.3d 216, 218 (9th Cir. 1995).

III.

DISCUSSION

The Delews' primary contention on appeal is that the district court erred by dismissing their section 1983 complaint on the ground that they failed to state an independent basis for relief under 42 U.S.C. § 1983.

In order to resolve this issue, we must determine whether the Delews' complaint alleged facts showing a deprivation of a right, privilege or immunity secured by the Constitution or federal law, by one acting under color of state law. *See Lopez v. Dep't of Health Servs.*, 939 F.2d 881, 883 (9th Cir. 1991). Because the district court dismissed under Rule 12(b)(6), we must accept all allegations of material fact as true and construe them in the light most favorable to the Delews. *See Argabright v. United States*, 35 F.3d 472, 474 (9th Cir. 1994).

[1] The Delews have indeed alleged a constitutional violation, namely, that the defendants violated the Delews'

right of meaningful access to the courts by covering up the true facts surrounding Erin Rae Delew's death. The Supreme Court held long ago that the right of access to the courts is a fundamental right protected by the Constitution. *See Chambers v. Baltimore & Ohio R.R. Co.*, 207 U.S. 142, 148 (1907). More recently, the Sixth Circuit held that the Constitution guarantees plaintiffs the right of meaningful access to the courts, the denial of which is established where a party engages in pre-filing actions which effectively covers-up evidence and actually renders any state court remedies ineffective. *See Swekel v. City of River Rouge*, 119 F.3d 1259, 1262 (6th Cir. 1997), *cert. denied*, 118 S. Ct. 690 (1998). That court stressed that a "plaintiff cannot merely guess that a state court remedy will be ineffective because of a defendant's actions." *Id.* at 1264.

[2] Applying the Sixth Circuit's reasoning in *Swekel* to the Delews' case, we believe the Delews' complaint alleges a cognizable claim under section 1983.[8] To prevail on their claim, the Delews must demonstrate the defendants' cover-up violated their right of access to the courts by rendering "any available state court remedy ineffective." *See id.* However, because the Delews' wrongful death action remains pending in state court, it is impossible to determine whether this has in fact occurred.

[3] The district court additionally erred by holding that the Delews' conspiracy cover-up claim failed to state a claim for relief. In support of their conspiracy claim, the Delews allege that Janet Kathleen Wagner left the accident scene during the investigation and that the LVMPD and NHP officers permitted Wagner to do so. Construing these facts in a light

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[8] We reject Wagner's argument that the Delews are precluded form alleging a constitutional violation for conduct occurring after the death of Erin Rae Delew. The victims of the cover-up are the decedent's survivors, not the decedent. *See Gibson v. City of Chicago*, 910 F.2d 1510, 1523 (7th Cir. 1990).

most favorable to the Delews, it is reasonable to infer an understanding between Wagner and the officers to cover-up the true facts of Erin Rae Delew's death and thereby deprive the Delews of their right of access to the courts. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 152 (1970) (in order to satisfy color of state law requirement under civil conspiracy theory, plaintiff need only have shown that there was an understanding between civilian and officers to deprive plaintiff of her rights).

[4] We conclude that the district court should have recognized the cognizability of the Delews' claims and dismissed their complaint without prejudice. By disposing of the case in this fashion, the Delews would have the opportunity to re-file their section 1983 action if in fact the defendants' alleged cover-up actually rendered all state court remedies ineffective. We therefore remand with instructions to dismiss the Delews' section 1983 complaint without prejudice.

[5] We further conclude that the district court erred in its ruling that the Delews split their causes of action by bringing a state wrongful death action and a separate action under 42 U.S.C. § 1983. The Nevada state court effectively split the Delews' causes of action by denying their motion to join the two actions in one proceeding. The rule concerning claim splitting is not applicable here. *See Smith v. Hutchins*, 93 Nev. 431, 432-33 (1977).

REVERSED and REMANDED.

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

* * *

MICHAEL C. DELEW, individually, MICHAEL C. DELEW, as Special Administrator of the Estate of ERIN RAE DELEW; H. ROY MAYBERRY; and VICKIE MAYBERRY,	)	CV-S-97-090-PMP (LRL)
Plaintiffs,	)	
v.	)	ORDER
JANET KATHLEEN WAGNER, LAS VEGAS METROPOLITAN POLICE DEPARTMENT, STATE OF NEVADA, EX REL., NEVADA HIGHWAY PATROL, LIEUTENANT EDWARD JENSEN, SERGEANT RICHARD WOMACK, SERGEANT CURTIS ALBERT, SERGEANT THOMAS HARMON, DETECTIVE RICHARD HART, DETECTIVE WILLIAM JOHNSON, OFFICER WILLIAM SMITH, OFFICER KEITH BOWERS, OFFICER DAVID WAGNER AND OFFICER GREG GOEN, SERGEANT HARVEY WEATHERFORD, TROOPER JOSEPH A. SMITH, TROOPER GARTH GARDNER, TROOPER JOSEPH WYNGARD AND TROOPER JAMES BRANNUM, DOES I through XX, inclusive, and ROE CORPORATIONS XX through XXX,	)	
Defendants)		

This action was commenced on September 26, 1996, by the filing of Plaintiffs' Complaint in the Eighth Judicial District Court in and for the County of Clark, State of Nevada (#1B). On January 23, 1997, the action was removed from the Eighth Judicial District Court to this Court.

Plaintiffs' action is based upon a fatal accident occurring on September 27, 1994, in which Erin Rae Delew, wife of Plaintiff Michael C. Delew, was struck while riding her bicycle by a vehicle driven by Defendant Janet Kathleen Wagner. Plaintiffs have filed a separate wrongful death action arising from the accident. This case, however, involves two claims for relief. Plaintiffs' first cause of action is for an alleged violation of civil rights under 42 U.S.C. § 1983, and Plaintiffs' second cause of action is for conspiracy to violate 42 U.S.C. § 1983. In essence, Plaintiffs' Complaint is grounded on the claim that Defendants Wagner and various Defendant Officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol acted and conspired to act to cover up the true facts of Erin Delew's death to protect Janet Wagner from criminal and civil liability.

On February 10, 1997, Defendants LVMPD, Lt. Edward Jensen, Sgt. Richard Womack, Sgt. Curtis Albert, Sgt. Thomas Harmon, Det. Richard Hart, Det. William Johnson, Officer William Smith, Officer Keith Bowers, Officer David Wagner and Officer Greg Goen filed an Errata to Petition for Removal of Civil Action (#8) which refiled Defendant Janet Wagner's Motion to Dismiss (#8A) originally filed in the Eighth Judicial District Court on January 4, 1997. On March 7, 1997, Plaintiffs filed an Opposition to Defendant's Motion to Dismiss (#14) to which Defendant Replied (#19) on March 17, 1997.

By the Motion to Dismiss, Defendants correctly argue that Plaintiffs cannot split their causes of action by bringing a state wrongful death action and a separate action under 42 U.S.C. § 1983 on the facts alleged in this case. Certainly

Plaintiffs can and have maintained a wrongful death action against Defendant Janet Wagner for the accident which killed Erin Delew. However, that accident does not provide a basis for a lawsuit under 42 U.S.C. § 1983 against Defendant Janet Wagner as a private citizen. To the extent Plaintiffs seek to maintain a § 1983 claim based upon an alleged conspiracy between Defendant Janet Wagner and various officers of the Las Vegas Metropolitan Police Department and Nevada Highway Patrol, Plaintiffs' claim is defective because there is no evidence or allegation of evidence indicating that the actions of the alleged conspirators infringed upon a cognizable protected right of Plaintiffs.

This Court cannot evaluate the extent to which the alleged failure to investigate and/or coverup regarding an investigation may have evidentiary value in Plaintiffs' wrongful death action pending in state court. Suffice it to say, the allegations do not provide an independent basis for Plaintiffs' claims under 42 U.S.C. § 1983.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss (#8A) is granted and this action is dismissed as to all Defendants.

DATED: April 3, 1997

s/

PHILIP M. PRO
United States District Judge

CONSTITUTIONAL PROVISIONS

Article IV, Section 2 provides: "The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in several States."

The First Amendment provides, in relevant part: "Congress shall make no law . . . abridging . . . the right of the people . . . to petition the Government for a redress of grievances."

The Fifth Amendment provides, in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law. . . "

The Fourteenth Amendment provides, in relevant part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTORY PROVISIONS

Title 42 U.S.C. § 1983 provides, in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . .

Nev. Rev. Stat. § 484.379 (1997) provides, in relevant part:

> It is unlawful for any person who: (a) is under the influence of intoxicating liquor; (b) has 0.10 percent or more by weight of alcohol in his blood; or (c) is found by measurement within 2 hours after driving or being in actual physical control of a vehicle to have 0.10 percent or more by weight of alcohol in his blood, to drive or be in actual physical control of a vehicle on a highway or on premises to which the public has access.